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No. 164

In the Supreme Court of the United States

OCTOBER TERM, 1938.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BANDINI PETROLEUM COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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OCTOBER TERM, 1938

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BANDINI PETROLEUM COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause on April 1, 1938, affirming a decision of the Board of Tax Appeals.

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 21–22)[1] is unreported. It was stipu-

[1] By stipulation between the parties, the record in this case is not being printed. Record references are to the unprinted record, a certified copy of which has been filed with the Clerk of this Court.

lated before the Circuit Court of Appeals that the decision in the present case should abide the decision of the Court in *Commissioner* v. *Wilshire Oil Company, Inc.*, in which case a petition for certiorari is being filed simultaneously herewith.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 1, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in determining the amount of depletion allowable under Section 114 (b) (3) of the Revenue Act of 1928, development expenditures and the related depreciation which the taxpayer elected to deduct currently should be deducted from "the gross income from the property" in arriving at "the net income of the taxpayer" from the property for the purpose of applying the 50 per cent limitation provided therein.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
> In computing net income there shall be allowed as deductions:
>
> * * * * * *
>
> (1) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion

and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *.

* * * * *

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for depletion.*—

* * * * *

(3) *Percentage Depletion for Oil and Gas Wells.*—In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 221. *Depletion of mines, oil and gas wells; depreciation of improvements.*—

* * *

* * * * *

(i) "Depletion allowance based on the income from oil and gas wells": The deduction for depletion based on the income from oil and gas wells shall not exceed 50 per cent of the net income of the taxpayer, computed

without allowance for depletion, from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to the income from the property. The phrase "net income of the taxpayer (computed without allowance for depletion)" means the gross income from the sale of oil and gas less the deductions in respect to the property upon which depletion is claimed, including overhead and operating expenses, development expenses (if the taxpayer has elected to deduct development expenses), depreciation, taxes, losses sustained, etc., but excluding any allowance for depletion. * * *

* * * * * *

ART. 243. *Charges to capital and to expense in the case of oil and gas wells.*— Such incidental expenses as are paid for wages, fuel, repairs, hauling, etc., in connection with the exploration of the property, drilling of wells, building of pipe lines, and development of the property may at the option of the taxpayer be deducted as a development expense or charged to capital account returnable through depletion. If in exercising this option the taxpayer charges these incidental expenses to capital account, in so far as such expense is represented by physical property it may be taken into account in determining a reasonable allowance for depreciation. The cost of drilling nonproductive wells may at the option of the operator be deducted from gross income as a development expense or charged to capital account returnable through depletion

> and depreciation as in the case of productive wells. An election once made under this option will control the taxpayer's returns for all subsequent years. * * *

STATEMENT

The facts may be summarized as follows (R. 17–20):

The respondent is a California corporation engaged in the business of producing oil and gas from properties located in Southern California (R. 17). In filing its income tax return for the year 1929 the respondent, pursuant to the regulations, claimed and was allowed as deductions from gross income so-called development expenditures in the amount of $643,284.79 (R. 18). The respondent claimed, however, that in determining its "net income * * * from the property" for the same year for the purpose of computing the allowable depletion under Section 114 (b) (3) of the Revenue Act of 1928 the development expenditures were not to be deducted. The Board of Tax Appeals upheld this contention of the taxpayer (R. 21–22), and the decision of the Board was affirmed by the Circuit Court of Appeals, Judge Wilbur dissenting (R. 38–39).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the depletion allowance under Section 114 (b) (3) of the Revenue Act of 1928 should be computed without taking into consider-

ation development expenditures and the related depreciation, which items were claimed by the respondent and allowed as deductions in computing the taxable net income for the years in controversy.

2. In holding that development expenditures and the related depreciation, which items the respondent elected to deduct currently, should not be deducted in computing the "net income * * * from the property" under Section 114 (b) (3) of the Revenue Act of 1928.

3. In failing to reverse the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

The question presented is identical with that presented in *Guy T. Helvering, Commissioner of Internal Revenue* v. *Wilshire Oil Company, Inc.*, No. —, October Term, 1938, petition for a writ of certiorari in which case is being filed simultaneously herewith. For the reasons set forth in the Government's petition in that case, it is respectfully submitted that the petition here should be granted.

ROBERT H. JACKSON,
Solicitor General.

JUNE 1938.

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